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CHARLES ELIOTT CONLEY

In the Supreme Court of the United States

OCTOBER TERM, 1941.

THE CITY OF INDIANAPOLIS, *et al.*,

Petitioners,

v.

THE CHASE NATIONAL BANK OF THE
CITY OF NEW YORK, TRUSTEE, etc.,
et al.,

Respondents.

Nos. 10 and 11.

THE CHASE NATIONAL BANK OF THE
CITY OF NEW YORK, TRUSTEE, etc.,

Cross-Petitioner,

v.

CITIZENS GAS COMPANY OF INDIAN-
APOLIS, *et al.*,

Respondents.

Nos. 12 and 13.

REJOINDER BRIEF OF CHASE NATIONAL BANK,
TRUSTEE, RESPONDENT AND CROSS-PETITIONER.

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Table of Abbreviations.

In addition to the abbreviations and designations used in our original brief (see pages 1 and 2 and the page facing page 1) we shall use the following abbreviations:

Cit. Gas Br.	Brief of Respondent, Citizens Gas Company of Indianapolis.
City Br.	Brief of City of Indianapolis, et al., Petitioners and Cross-Respondents, dated December 28, 1940.
City Ans. Br.	Answer Brief of Petitioners, City of Indianapolis, et al., to Respondent Chase's Supplemental Brief, filed about February 17, 1941.
Ind. Gas. Br.	Brief of The Indianapolis Gas Company, Respondent, dated January 20, 1941.
Pl. Br.	Brief of Chase National Bank, Trustee, Respondent and Cross-Petitioner, dated December 7, 1940.
Pl. R. Br.	Reply Brief of Chase National Bank, Trustee, dated February 5, 1941.
Pl. Supp. Br.	Supplemental Brief of Chase National Bank, Trustee, dated February 10, 1941.
Supp. Mem.	Supplemental Memorandum of City of Indianapolis, et al., Petitioners, filed about September 2, 1941.

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REJOINDER BRIEF OF CHASE NATIONAL BANK, TRUSTEE, RESPONDENT AND CROSS-PETITIONER.

Counsel for the City have filed a Supplemental Memorandum in which they reiterate many of their previous arguments. The Supplemental Memorandum presents no arguments not fully covered by the briefs already on file, with the single exception of the contention that the so-called "findings" of the trial court are unassailable (as to this contention see p. 14, *infra*). We shall, however, briefly discuss each of the ten propositions advanced by the City, in the order and under the numbers stated in its Supplemental Memorandum.

NOTE: Emphasis appearing in quotations throughout this brief is ours unless otherwise indicated.

For the convenience of the Court we attach hereto as Appendix A (*infra*, pp. 20 to 32) an Index and Analysis of Arguments, which contains a summary statement of our position and appropriate cross references to the various briefs of all the parties. A more complete answer to the City's arguments can be found in the earlier briefs, with the aid of this Index and Analysis of Arguments.

The City's Supplemental Memorandum is another example of the tactics adopted by the City throughout this litigation of attempting to evade the simple issues involved by presenting a host of spurious and wholly immaterial arguments. This case is very simple. It presents only a single issue, namely, whether the Lease became a part of the trust *res* in the hands of the corporate trustee. The determination of that issue must necessarily result in a finding that the Lease is binding on the public charitable trust and on the City as successor trustee.

**This Case Presents Only One Fundamental Issue—
Whether the Lease Became Part of the Trust Res in
the Hands of the Corporate Trustee.**

The City has made two fundamental admissions which are sufficient in and of themselves to establish that the Lease is binding on the City as successor trustee.

First, the City admits (I R. 243):

"that defendant Citizens Gas Company of Indianapolis conveyed and transferred all of its property to the City of Indianapolis subject to all outstanding legal obligations of that Company, * * *."

This admission establishes that the City had the power to take over *all* the trust property, subject to *all* the obligations of Citizens Gas, including those under the Lease, and that the City in fact exercised that power. It disposes of the issues raised by the City as to the effect of the statutory prohibitions on which it relies—the nature

and extent of its powers in this matter and the alleged burdensomeness of the Lease.

Counsel for the City understands the effect of this admission, as shown by the following colloquy during the oral argument:

“Mr. Justice Reed: We have here, then, at least as one phase of it, *to determine whether or not this lease became a part of the property of the corporate trustee.*”

Mr. Thompson: Your statement is entirely correct. *If it did, we are obligated by its terms.* If it did not, we are not obligated by it.”

There is the whole case in a nut shell. As counsel admitted, *the sole issue to be determined is “whether or not this lease became a part of the property of the corporate trustee.”* The City answered this question in the affirmative by its second admission.

Second, the City admits (1 R. 143):

“that as to these defendants, no controversy ever existed as to the binding force and effect of said Lease for and during the term of trusteeship of said Citizens Gas Company.”

This admission, which is further reinforced by a similar admission at the oral argument,* establishes that Citizens

* During the first oral argument the following colloquy took place between the Chief Justice and the City's counsel:

“The Chief Justice: Are you contending the lease was invalid as between the lessor and lessee?

“Mr. Thompson: Not if viewed solely as between the lessor and lessee.

“The Chief Justice: It was the Citizens Company that was established as this Charitable Trust, was it not?

“Mr. Thompson: As the original trustee.

“The Chief Justice: But it stood as the initial trustee at the time it took this lease?

“Mr. Thompson: That is true.

“The Chief Justice: Are you contending the lease from the Indianapolis to the Citizens in *that capacity* was invalid?

“Mr. Thompson: No, sir, I have admitted in my answer to the contrary.”

Gas had power to execute the Lease and make it binding on the public charitable trust.

The City takes refuge in the theory that the Lease was no longer binding after it became trustee, but the City has never been able to show how a Lease *admitted to be binding on the trust during the term of the trusteeship of Citizens Gas* could become voidable merely because of the substitution of a new trustee. There can be no doubt that the Lease was in fact "a part of the property of the corporate trustee" and that as successor trustee the City is obligated by its terms.

We ask the Court to bear in mind, during the following discussion, the simplicity of the issues here presented as demonstrating the complete immateriality of most of the arguments advanced by the City in its Supplemental Memorandum.

I.

CORRECTIONS IN THE CITY'S FACTUAL SUMMARY.

(Supp. Mem. 4.)

The City asserts that it rejected the assignment of the Lease (Supp. Mem. 4, 6, 12). There is no evidence to support this statement except the bare fact that the Board of Directors for Utilities passed a resolution *saying* it rejected the assignment. This resolution is meaningless, for at the same meeting the Board took action which had precisely the contrary effect in law (Pl. Br. 107-11), that is,

- (1) It accepted delivery of the assignment (II R. 467).
- (2) It had the assignment recorded (II R. 330, 467).
- (3) It retained possession of the assignment (II R. 468).
- (4) It took possession of the leased property (II R. 350), with no arrangement authorizing it to do so except as assignee (Pl. R. Br. 3, Pl. Supp. Br. 4).

Various other acts of the Board at this same meeting of September 9, 1935, which had the legal effect of an acceptance of the assignment are summarized in our original brief (pp. 106, 111-117).

The statement (Supp. Mem. 4, 6) that the City Council ratified this supposed rejection is only a half truth. The Council ratified "all acts, steps and proceedings whatsoever relating to such matter" (DX 8, III R. 1018; offered, II R. 429), which necessarily means that it ratified all the acts to which we have just referred (Pl. R. Br. 4-5).

II.

THE CITY'S CLAIM THAT THE LEASE WHEN EXECUTED WAS NOT BINDING ON THE CITY IS WHOLLY IM- MATERIAL.

(Supp. Mem. 5-6.)

The City's argument that it did not sign the Lease and is not named as a party obligated thereby (Supp. Mem. 5-6, 8-9) is too trivial to require comment. The liability of an *assignee or successor trustee* never depends upon his signing or being named in the original lease, but upon the subsequent action by which he accepts an assignment or accepts the trust.

The City's contention that it accepted the entire trust *res* but that the trust *res* did not include the Lease (Supp. Mem. 6) is completely at variance with the admissions made in its answer (I R. 145-6) and on the oral argument (footnote, p. 3, *supra*) to the effect that the Lease was a valid obligation of the public charitable trust as long as Citizens Gas continued as trustee. The question is whether the mere substitution of a new trustee for Citizens Gas had the effect either

- (a) of invalidating a Lease which had been valid and binding on the trust for 22 years, or
- (b) of separating the Lease from the other trust assets of which it had theretofore been a part.

III.

NO ISSUE HAS BEEN RAISED AS TO WHETHER "MUNICIPAL AUTHORITY COULD RATIFY OR VALIDATE THE LEASE" AND THE STATUTORY PROHIBITIONS UPON WHICH THE CITY RELIES HAVE NO APPLICATION TO THIS CASE.

(Supp. Mem. 6-9.)

The argument (Supp. Mem. 6-8) that the Lease itself was prohibited by Sections 85 and 254 of Chapter 129 of the Acts of 1905 (quoted, Pl. Br. 147-9) is absurd. These statutes obviously relate solely to contracts to which a municipality is a party and the City was not a party to the contract here in question.

The issue is not whether the City had power to execute the Lease in the first place, but whether it had power to take over the trust property subject to the obligations under the Lease.

III-A.

The City Had Ample Authority to Accept the Trust and Its Accompanying Obligations, Including Those Under the Lease.

The "validating acts" of 1929 (quoted, Pl. Br. 150-5), prepared by counsel for the City for this very purpose (Pl. Br. 101-3), removed all possible doubt as to the City's power to take over the trust property subject to the obligations under the Lease (Pl. Br. 96-8). The City now admits its power to take over the leasehold estate together with the rest of the trust property* (Supp. Mem. 9-12).

* Thus, the City says that "a mere reading of the applicable statutes discloses that they are permissive in character and give authority to accept property or leases without the slightest indication of legislative intent that the City shall be *required* to do so." (Supp. Mem. 10, *italics are the City's*).

III-B.

**The City Took the Necessary Action to Accept the Trust,
Including the Leasehold and Its Accompanying Obligations.**

The City asserts that it took no action agreeing to be bound by the terms of the Lease (Supp. Mem. 6), but the fact is that the Lease was in no way foisted on the City. The City admits that Citizens Gas "transferred *all* of its property to the City of Indianapolis subject to *all* outstanding legal obligations of that Company" (I. R. 243). In addition, as we have previously shown (Pl. Br. 98-106, 107, 111-17; *supra*, pp. 4-5), the proper agencies of the City deliberately took the appropriate steps to take over *all* the trust property subject to *all* the obligations of Citizens Gas, including those under this Lease.

IV.

**THE CITY WAS REQUIRED TO ACCEPT THE LEASE IF IT
ACCEPTED THE TRUST.**

(Supp. Mem. 9-12.)

Section 1 of Chapter 78 of the Laws of 1929 (quoted, Pl. Br. 152-5), on which the City relies as merely permitting it to take over the Lease if it wished to do so (Supp. Mem. 10), provides (Pl. Br. 154):

"Whenever any instrument of transfer or conveyance shall be executed, transferring or conveying the property, either real or personal, of any such corporation to such town or city *the title to such property shall rest in such town or city, subject to all outstanding legal obligations of said corporation * * *.*"

Thus, when the City took over the trust property, title to that property vested in the City "subject to all outstanding legal obligations of said corporation [Citizens Gas]," including those under the Lease.

Even in the absence of this statute, the City could not legally take over the trust property without at the same

time taking *all* that property, including the leasehold, and taking that property subject to *all* the obligations incurred by the initial trustee, including those under the Lease (Pl. Br. 98-9, 111). Indeed, the City admits (I R. 243) "that defendant Citizens Gas Company of Indianapolis conveyed and transferred *all* of its property to the City of Indianapolis subject to *all* outstanding legal obligations of that Company * * *."

V.

THE CIRCUIT COURT OF APPEALS WAS CORRECT IN HOLDING THAT CITIZENS GAS HAD POWER TO EXECUTE THE LEASE AND MAKE IT BINDING ON THE TRUST FOR THE FULL TERM OF THE LEASE.

(Supp. Mem. 12-19.)

The City contends that "grants by a municipality are to be strictly construed and that nothing passes by implication" (Supp. Mem. 13, 16-18). The cases cited all deal with grants of rights to use public property, whereas the question at issue is the nature and extent of the powers of Citizens Gas arising out of its contract with the City.

As shown by *City of Vincennes v. Citizens' Gaslight Co.*, 132 Ind. 114, 31 N. E. 573, when, as in the case at bar, a franchise contains a *contract* with the municipality as well as a *grant* to occupy the streets, such *contract* is "construed and interpreted like any other written contract." The City once more disregards the *City of Vincennes* case, although we relied on it in our original brief (p. 58), and in our reply brief (p. 33) called the City's attention to its failure to mention that case. Evidently, the City cannot deny that the applicable law of Indiana is directly contrary to its contention.

The City's argument that power to make the Lease cannot be implied (Supp. Mem. 12, 16) also disregards the express statutory power of Citizens Gas to make the Lease (Pl. Br. 56). As the Supreme Court of Indiana held in the

Williams case, this statutory power supersedes the limitations, if any, arising from the trust (Pl. Br. 66-9; Pl. R. Br. 37-9).

Likewise the City has consistently ignored the fact that for 22 years it construed the powers of Citizens Gas as including the power to make this Lease. On two different occasions while this case has been pending in this Court we have called attention to the City's failure to deal with this fact (Pl. Br. 118, Pl. R. Br. 32). Under the law of Indiana, "it is the duty of a court, where the language of a contract is indefinite or ambiguous, to adopt the construction and practical interpretation which the parties themselves have put upon the contract * * *." *City of Vincennes v. Citizens' Gaslight Co.*, 132 Ind. 114, 31 N. E. 573, 576 (Pl. Br. 58, 72). Under these circumstances the City's continued silence on this subject is of great significance.

V.A.

The City Had Ample Opportunity to be Heard on the Question Whether the Alleged Burdensomeness of the Lease Would be a Good Defense if Proved and the Court of Appeals' Direction to Enter Final Judgment Without a Retrial of That Immaterial Issue Was in Full Accord With Due Process of Law.

(Supp. Mem. 14-16.)

The City is still complaining that the Circuit Court of Appeals held that the "issue of the burdensome character of the lease was *res adjudicata*" (Supp. Mem. 15). We have shown that the Court did not so hold (Pl. R. Br. 26) and that even if it did, such holding would be proper because the facts as to the *Williams* case and the legal effect thereof were fully presented to the trial court (Pl. R. Br. 28). If, as the City contends, the parties did not have an opportunity in the trial court to present all the facts as to the *Williams* case and to argue the question of their signifi-

cance, why did the City request (No. 33, III R. 1092) and the trial court grant a *finding of fact* that (No. 40, III R. 1179):

"None of the questions involved in this case were actually litigated in the Williams case nor could such questions have been litigated under the issues in that case."

The City's persistence in reiterating its complaint that it has been denied due process of law makes it advisable to give further consideration to what the City is demanding and what would happen if its demands were granted.

The lack of any foundation for the City's position on this question of burdensomeness clearly appears from an analysis of what the City is asking. The City demands (IV R. 1346) "*an opportunity to prove the averments of its counter-claim and to have the lower Court determine whether when executed this lease was in fact burdensome*" (italics are the City's). What if the City were successful in proving that "*when executed this lease was in fact burdensome*"? In its answer and counterclaim the City contends that in such event the Lease "*was a lease which the initial trustee had no power to make beyond the definitely fixed term of its trusteeship*" and that it "*did not constitute an asset of said trust which it was bound to accept*" (I R. 181, 186). The alleged reserved issue which the City wants tried states the City's claim in these words (II R. 322): "*that the City * * * had the right as such successor trustee to refuse and reject an assignment of such lease on the ground that such lease was burdensome and not advantageous to such trust.*"

Thus the City's contention is that as successor trustee the City could reject this Lease after the parties thereto had operated thereunder with its consent for a period of 22 years, on the ground that the Lease was burdensome when executed. The City has never cited, and cannot cite, a single case to substantiate its claim that a successor

trustee can refuse to take over an asset of the trust which it deems to be burdensome. Indeed, the City's only answer to the well established rule that a successor trustee must take all or none of the trust property is its assertion that it has in fact taken over the entire trust *res* (Supp. Mem. 6). Surely due process of law does not necessitate an opportunity to prove that one of the trust assets is a burden when, in any event, the City's only right was to take over *all* of the trust assets or none and it admits that it has taken them *all*.

As a matter of fact, it clearly appears that the Lease has not been the slightest burden to the City since it took over the trust property. The City has been putting in escrow sums equal to the rentals required by the Lease, and it asserts that (City Br. 26):

*** * * From the escrowed fund, together with funds arising from the operation of the property (II R. 542, 543), the City will be required to and *is abundantly able to pay the entire judgment*, and Indianapolis Gas will be wholly insulated from any liability."

The leased property is two-thirds of the property which produced the escrow fund and the "funds arising from the operation of the property." (City Br. 46, Supp. Mem. 7.) Thus, the City's position is in reality that the operation of the trust property has been so successful as to leave no doubt that the obligations of the Lease can be easily met from the earnings. This reduces the City's contention to this, not that the Lease is a burden to the City, but that it would be even more profitable if more advantageous terms could be procured.

Further weaknesses in the City's position become clear when we visualize what would happen if this case were in fact sent back to the trial court for that court to ascertain whether the Lease was burdensome when executed.

(1) That court would have the practically impossible task of determining what the Indianapolis Gas properties

were worth 28 years ago. The difficulties involved in such a task are indicated by the fact that even the formal pleadings before the Public Service Commission in 1913 cannot be located¹ at this time (PX 88, III R. 846, offered, II R. 331).

(2) That court would be required to determine the value of intangible items which cannot be evaluated. For example, how could that court determine the value of the elimination of a competitor admitted (City Br. 46, Supp. Mem. 7) to be twice the size of Citizens Gas? A contemporaneous report by Citizens Gas to its stockholders (PX 91, III R. 886, 887, offered, II R. 342) stated that the competition from Indianapolis Gas was "dangerous to the company and the community" (Pl. Br. 6). When the City was ready to take over the trust property in 1935 it clearly revealed that it too realized the great value of the elimination of this competition. Thus the Board of Directors for Utilities formally covenanted with the purchasers of the City's Gas Plant Revenue Bonds that the City "will use all reasonable efforts to resist competition and *maintain the exclusive right to serve gas*" in the City and its environs (PX Stip. 47, III R. 822, 828, offered, II R. 327).

(3) That court would be required to take due cognizance of the fact that the Lease was an act of the initial trustee in the exercise of its discretion. Courts do not interfere with the exercise of discretion by trustees except in a clear case. There has never been a suggestion throughout this case that the Public Service Commission or any director or trustee of Citizens Gas was actuated by anything but the highest motives in making and approving this Lease.

(4) That court would also have to take into account the contemporaneous decision of the Public Service Commission, which the City admits includes the determination that the Lease "was advisable *and in the public interest*" (City Br. 71, italics are the City's). Indeed, as the City

also admits, this decision "is *conclusive* upon the courts in a collateral action" (City Br. 71).

(5) That court would also be bound to give due weight to the City's own contemporaneous belief in the value of the Lease. In the case at bar all defendants have admitted (I R. 137, 149, 223) plaintiff's allegations that (I R. 10): "No objection by petition to said Commission or otherwise was ever made by said City of Indianapolis either to the execution of said lease or to the orders made by said Commission * * *."

Furthermore, all this effort would be wasted, for under the law of Indiana neither a municipality nor any other party to or assignee of a contract or lease can escape its obligations thereunder by showing that they were originally burdensome or have become burdensome (Pl. Br. 53). Due process of law does not involve the necessity of attempting to determine a question of fact which would have no legal significance when determined (Pl. Br. 55).

VI.

THE CIRCUIT COURT OF APPEALS DID NOT DEPART FROM INDIANA LAW IN DEALING WITH THE ESTOPPEL OF THE CITY TO ASSERT THE UNENFORCEABILITY OF THE LEASE.

(Supp. Mem. 19-21.)

On this subject the error assigned by the City is the supposed failure of the court below "to follow the controlling Indiana decisions on (a) the question of estoppel of a municipal corporation" (City Br. 13). The complete immateriality of this assignment is shown by the City's admission that "The Circuit Court of Appeals made no express holding on the question of estoppel * * *." (City Br. 53, footnote).

The City's arguments on this question have already been fully answered (Pl. Br. 124-9; Pl. R. Br. 43-6). If

the Circuit Court of Appeals had held the City estopped to deny the enforceability of the Lease for its full term, such holding would have been fully warranted by the facts and the Indiana law applicable thereto.

VII.

THE TRIAL COURT'S FINDINGS OF FACT AGAINST THE PLAINTIFF ARE CONTRARY TO THE FACTS ESTABLISHED BY THE RECORD AND ARE NOT BINDING ON PLAINTIFF.

(Supp. Mem. 21.)

The City now contends for the first time that the so-called "findings" of the trial court in its favor are unassailable.* Most of the findings and conclusions upon which the City relies (Supp. Mem. 5, 6, 16, 20) are not findings of fact as to which there was a contradiction or dispute in the evidence, but are merely inferences of fact or law drawn by the trial court from the admitted facts.[†] Under such circumstances the Circuit Court of Appeals and this Court are entirely free to draw their own inferences from these undisputed facts.

Harkin v. Brundage, 275 U. S. 36, 53;

United States v. South Georgia Ry. Co., 107 F. (2d) 3 (C. C. A. 5th, 1939);

United States v. Mitchell, 104 F. (2d) 343, 346 (C. C. A. 8th, 1939);

* The City's lack of confidence in the "findings of the trial court" is shown by the fact that its briefs heretofore filed in this Court contain only one citation to any of the trial court's findings. Even that one citation was not made until after the first oral argument in this Court (City Ans. Br. 4).

† Counsel for the City concede that this is the situation. Thus in their letter of September 23, 1941, to the Clerk of this Court with respect to the enlargement of time for oral argument they say:

"While in the main, the facts are undisputed, counsel for Indianapolis Gas, Chase and the City disagree in respect of the inferences to be drawn from the facts."

Kaeser & Blair, Inc. v. Merchants Association, Inc.,
64 F. (2d) 575, 576 (C. C. A. 6th, 1933);
Bianchi v. Vere, 17 F. (2d) 22, 25 (C. C. A. 1, 1927)

The trial court's findings and conclusions (III R. 1160-92) were nearly all taken substantially verbatim from the City's requests (III R. 1078-1103). Moreover, the findings on the contested issues of fact are wholly unsupported by any evidence. Neither plaintiff nor any reviewing court is bound by such findings and we are fully warranted in making use of the facts shown by the record to substantiate our contentions.

VIII.

THE JUDGMENT IN THE WILLIAMS CASE IS A CONCLUSIVE DETERMINATION, AS RES JUDICATA AND AS AN AUTHORITATIVE STATEMENT OF THE LAW OF INDIANA, THAT THE LEASE IS BINDING ON THE TRUST AND ON THE CITY AS SUCCESSOR TRUSTEE.

(Supp. Mem. 22.)

The City's assertion that "The validity of the 99-year lease against the City as successor trustee was not actually litigated in the *Williams* case" (Supp. Mem. 22) has already been shown to be devoid of any foundation (Pl. Br. 76-9). As we have there shown, the Indiana Supreme Court refused to disturb the Lease, which Williams sought to have removed as "*an unlawful cloud upon the title of said Municipal City, as trustee*" (II R. 772). This refusal was in December, 1933, and it is clear that the court held that the Lease was binding on the trust, not only during the short period between its decision and the City's taking over of the trust property, but for the full term of the Lease. The Indiana Supreme Court thereby conclusively determined that the Lease is a binding obligation of the trust and of the City as successor trustee. This determination is binding on the parties to that case and is also an authoritative statement of the Indiana law as to the issues presented by the City in the case at bar.

IX.

**THE CIRCUIT COURT OF APPEALS PROPERLY REFUSED
TO REALIGN INDIANAPOLIS GAS WITH CHASE AS
A PARTY PLAINTIFF.**

(Supp. Mem. 23)

The City's theories that plaintiff cannot make Indianapolis Gas a defendant to this suit because (1) Indianapolis Gas cannot in good faith deny its liability for the unpaid interest and (2) plaintiff claims that the City is also liable for the unpaid interest, have already been shown to be groundless (Pl. Br. 38-45; Pl. R. Br. 12-14).

The alleged insulation against the liability of Indianapolis Gas, on which the City relies (Supp. Mem. 23), arises out of the judgment against the City which the City is seeking to have reversed. Under the City's theory, if it should be successful in this Court on the merits, federal jurisdiction would once more be restored by the decision of this Court. It is thus clear that the City's contention is directly contrary to the well established rule that federal jurisdiction is in no way dependent on the outcome of a case on its merits (Pl. R. Br. 12-13).

The sole authority on which the City relies is *Sutton v. English*, 246 U. S. 199, which is fully reviewed in our original brief (pp. 41-2). The City claims that this case holds that parties must be aligned according to their attitude toward "the main and the controlling controversy" (Supp. Mem. 23). Actually, in that case the alignment of the defendant, Cora Spencer, was based on *the only controversy* between her and the plaintiffs, namely, that as to the distribution of the property sought to be recovered in that suit. That controversy was not "the main and the controlling controversy," for it was one in which the other defendants had no interest whatever and one which would be material only in the event of a recovery from those other defendants.

In reality *Sutton v. English* holds that there should be no realignment if there is a *single* substantial controversy between the plaintiff and the defendant sought to be realigned. We have previously enumerated the substantial controversies between plaintiff and Indianapolis Gas (Pl. R. Br. 9-11). We repeat the statement in our original brief (p. 40) and our reply brief (p. 11) that "The City has never cited a single case in which the plaintiff had even one substantial controversy with a defendant and such defendant was realigned with the plaintiff for jurisdictional purposes."

X.

THE SIGNIFICANCE OF THE FISHBACK CASE.

(Supp. Mem. 24.)

The City still argues that the decision in the *Fishback* case is not *res judicata*, despite our statement that plaintiff does not rely on that decision as a binding adjudication between it and the City (Pl. Br. 92).

In the *Fishback* case the City and Citizens Gas upheld the validity of the Lease during the eight years the case was pending in the trial court (Pl. Br. 8-10). This is compelling evidence in support of plaintiff's claims as to laches (Pl. Br. 129), estoppel (Pl. Br. 120, 124; Pl. R. Br. 43) and practical construction of the Franchise and Charter of Citizens Gas as they relate to the power of Citizens Gas to make the Lease (Pl. Br. 70).

CONCLUSION.

As we have seen, the City concedes (1) that the City is obligated by the Lease if it was "part of the property of the corporate trustee," and (2) that the Lease was valid and binding during the trusteeship of the corporate trustee (*supra*, pp. 2-4). The City's contention is that the Lease became voidable when Citizens Gas was replaced as trustee.

The City, however, has never been able to show how a trustee's contract, admittedly valid when executed and for a number of years thereafter, becomes a nullity merely because a new trustee takes over the trust property.

We submit that the Lease is binding on the City as successor trustee and that the decision of the Circuit Court of Appeals is correct in all respects except as to the rate of interest on the unpaid coupons and on plaintiff's judgment.

Respectfully submitted,

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APPENDIX A.

INDEX AND ANALYSIS OF ARGUMENTS.

INDEX.

I. POWER OF CITIZENS GAS TO EXECUTE LEASE AND MAKE IT BINDING ON TRUST.*(Infra, p. 21.)***II. POWER OF CITY TO ACCEPT TRUST AND ACCOMPANYING OBLIGATIONS, AND ACTIONS TAKEN IN EXERCISE OF POWER.***(Infra, p. 23.)***III. EFFECT OF JUDGMENT IN WILLIAMS CASE AND OTHER DECISIONS.***(Infra, p. 25.)***IV. ESTOPPEL OF CITIZENS GAS AND CITY TO ATTACK VALIDITY OF LEASE.***(Infra, p. 26.)***V. INTEREST RATE ON COUPONS AFTER MATURITY AND ON JUDGMENT.***(Infra, p. 28.)***VI. REALIGNMENT OF PARTIES.***(Infra, p. 28.)***VII. ALLEGED BURDENSONESS OF LEASE AS A DEFENSE.***(Infra, p. 29.)***VIII. COMPLIANCE WITH INDIANA LAW.***(Infra, p. 30.)*

ANALYSIS OF ARGUMENTS.

I. CITIZENS GAS HAD POWER TO EXECUTE THE LEASE AND MAKE IT BINDING ON THE TRUST FOR THE FULL TERM OF THE LEASE.

(Pl. Br. 56-74; Pl. R. Br. 32-41; Cit. Gas Br. 6-7; Ind. Gas Br. 62-75; City Br. 43-52; Supp. Mem. 5-6, 12-13, 16-19; *supra*, pp. 8-9.)

The City admits (I.R. 145-6) that the Lease was valid during the 22 years in which Citizens Gas was trustee. The mere change in trustees could not affect the validity of the Lease.

(a) Citizens Gas Had Express Statutory Authority to Make the Lease.

(Pl. Br. 56-8; City Br. 49-50; *supra*, pp. 8-9.)

The Lease was authorized by § 95¹ of the Public Service Commission Law (quoted, Pl. Br. 144-5).

(b) The Franchise and Charter Powers of Citizens Gas Included the Power to Execute the Lease and Make It Binding on the Trust For the Full Term of the Lease.

(Pl. Br. 58-66; Pl. R. Br. 33-7; City Br. 43-52; Supp. Mem. 16-19; *supra*, p. 8.)

Since Citizens Gas was originally given *no* express powers, some powers had to be implied, such as power to lease or otherwise acquire property. Also, under Indiana law the charter powers of Citizens Gas included the express power, conferred by statute in 1913, to enter into the Lease.

(c) The Statutory Power to Make the Lease Overrode the Limitations, If Any, Arising From the Public Charitable Trust.

(Pl. Br. 66-9; Pl. R. Br. 37-9; City Br. 49-50.)

The *Williams* case established, as a matter of Indiana law, that the public charitable trust is subject to the power of the state to control as a public utility. This power was exercised by the enactment of the Public Service Commission Law and by the Commission's approval of the Lease pursuant to the provisions of that law.

(d) The Williams Case Conclusively Determined That Citizens Gas Had Power to Execute the Lease and Make It Binding on the Trust For the Full Term of the Lease.

(Pl. Br. 69-70, 75-90; Pl. R. Br. 39-40, 50-55; City Br. 75-8, 81-6; Supp. Mem. 22; *supra*, p. 15.)

The decision in the *Williams* case that Citizens Gas had power to execute the Lease is a binding adjudication between the parties and a controlling authority as to the Indiana law.

(e) The Practical Construction of the Franchise and Charter By the City and Citizens Gas Shows That Those Instruments Gave Citizens Gas Power to Execute the Lease and Make It Binding on the Trust For the Full Term of the Lease.

(Pl. Br. 70-4; Pl. R. Br. 32; *supra*, p. 9.)

For 22 years the City and Citizens Gas construed the Franchise and Charter of Citizens Gas as granting the power to make the Lease. This practical construction of the contract between the City and Citizens Gas by the parties themselves is of great, if not controlling, significance.

II. THE CITY HAD AMPLE AUTHORITY TO ACCEPT THE TRUST AND ITS ACCOMPANYING OBLIGATIONS, INCLUDING THOSE UNDER THE LEASE, AND TOOK THE NECESSARY ACTION TO EXERCISE THAT AUTHORITY.

(Pl. Br. 93-117; Pl. R. Br. 40-1; Ind. Gas Br. 70-74; City Br. 43-8; Supp. Mem. 6-9; *supra*, pp. 6-7.)

(a) The City Had Ample Authority to Accept the Trust and Its Accompanying Obligations, Including Those Under the Lease.

(Pl. Br. 93-8; Pl. R. Br. 40-1; Ind. Gas Br. 70-74; City Br. 43-8; City Ans. Br. 1-4; Supp. Mem. 6-12; *supra*, p. 6.)

The City had power to accept trusts and "to agree to conditions and terms accompanying the same." As the City admits (Supp. Mem. 9-12), the "validating acts" of 1929 (quoted, Pl. Br. 150-5) gave the City authority to accept this very trust, including the leasehold estate and its accompanying obligations.

(b) The City Took the Necessary Action to Accept the Trust, Including the Leasehold and Its Accompanying Obligations.

(Pl. Br. 98-107; Supp. Mem. 5-12; *supra*, pp. 2-4, 7.)

The City admits that it took over *all* the trust property (I R. 243). Since it also admits that the Lease was valid during the trusteeship of Citizens Gas (I R. 145-6), the leasehold was part of the trust property taken by the City.

(c) In Succeeding Citizens Gas As Trustee, the City Became Liable For All the Obligations of Citizens Gas, Including Those Under the Lease.

(Pl. Br. 111-17; City Br. 62; Supp. Mem. 9-12; *supra*, pp. 2-4, 7.)

The City admits that it took the property of Citizens Gas "subject to *all* outstanding legal obligations of that

Company" (I.R. 243) and that the obligations under the Lease were valid and binding obligations of that Company (I.R. 145-6). This necessarily means that the obligations under the Lease were among those to which the trust property remained subject in the hands of the City.

The trust property taken over by the City remained subject to the obligations under the Lease, for (1) the statutes under which the City took over the trust property expressly provided that it should remain subject to the obligations of Citizens Gas; (2) pursuant to statute and the Citizens Gas Franchise and Charter, the instruments conveying the trust property stated that it was being transferred subject to all the obligations of Citizens Gas; (3) the City gave Citizens Gas an Indemnity Agreement in which it agreed to protect Citizens Gas from all liability arising from any acts or omissions to act by Citizens Gas; (4) since Citizens Gas was left with no assets out of which to satisfy its obligations, the property of Citizens Gas taken over by the City remained subject to those obligations.

(d) The City Accepted the Assignment of the Lease and Took Possession of the Leased Property and Thereby Became Liable By Privity of Estate For the Obligations Under the Lease.

(Pl. Br. 10-11; Pl. R. Br. 3-5; City Br. 44-5, 57-62; City Ans. Br. 4-6; Supp. Mem. 4; *supra*, p. 4.)

The City's *ex parte* resolution saying that it rejected the assignment of the Lease is meaningless in view of the acts whereby it in fact accepted the assignment. Since the City had no agreement with Indianapolis Gas authorizing it to take possession of the leased property, it had the right to take possession only as assignee of the lease.

III. THE VALIDITY OF THE LEASE AND ITS BINDING EFFECT ON THE PUBLIC CHARITABLE TRUST HAVE BEEN CONCLUSIVELY ESTABLISHED BY THE JUDGMENT IN THE WILLIAMS CASE AND OTHER DECISIONS.

(Pl. Br. 74-92; Pl. R. Br. 46-55; Ind. Gas Br. 39-54; City Br. 67-86; Supp. Mem. 22, 24; *supra*, pp. 15, 17.)

(a) The Judgment in the Williams Case is a Conclusive Determination, *As Res Judicata* and *As an Authoritative Statement of the Law of Indiana*, That the Lease is Binding on the Trust and on the City *As Successor Trustee*.

(Pl. Br. 75-90; Pl. R. Br. 49-55; Ind. Gas Br. 51-54; City Br. 75-86; Supp. Mem. 22; *supra*, p. 15.)

The refusal of the Indiana Supreme Court to remove the Lease as an alleged "unlawful cloud upon the title of said Municipal City, as trustee" is a conclusive determination that the Lease is a binding obligation of the trust and of the City as successor trustee.

The City presents no issues which were not adjudicated in the *Williams* case and the judgment in that case would be conclusive even if the City were relying on new grounds of attack. Likewise, the mere transfer of the trust property did not affect the conclusiveness of the decision that the Lease is a binding obligation of the trust.

Williams was permitted to present the case on behalf of the trust. Hence it makes no difference what issues, if any, were raised between the trustee (the City) and its co-defendants. The City had the opportunity to support the contentions presented by Williams in behalf of the trust. It elected to oppose them.

Entirely aside from the question of *res judicata*, the *Williams* case settles the law of Indiana as to the very facts now presented to this Court.

(b) The Order of the Public Service Commission Conclusively Determined That the Lease is in the Public Interest (Consequently in the Interest of the Trust Also) and in Fulfillment of the Duties of Citizens Gas As a Public Utility.

(Pl. Br. 90-2; Pl. R. Br. 46-9; Ind. Gas Br. 39-45;
City Br. 67-71.)

The City admits that the Commission has conclusively determined that the Lease "was advisable *and in the public interest*" (City Br. 71). This decision is also a conclusive determination that the Lease was in fulfillment of the duties of Citizens Gas as a public utility and therefore superseded the limitations, if any, arising from the public charitable trust.

(c) The Fishback Case.

(Pl. Br. 92; Ind. Gas Br. 45-51; City Br. 72-5;
Supp. Mem. 24; *supra*, p. 17.)

In this case the City and Citizens Gas upheld the validity of the Lease during the 8 years immediately following its execution, before the trial court entered judgment.

(d) The Todd and Cotter Cases.

(Pl. Br. 13-14; Pl. R. Br. 50; City Br. 79-86.)

IV. THE CONTINUED ACQUIESCENCE IN THE VALIDITY OF THE LEASE BY CITIZENS GAS AND THE CITY FOR 22 YEARS, THEIR ACCEPTANCE OF ITS BENEFITS, AND THEIR REPRESENTATIONS AS TO ITS BINDING EFFECT ON THE TRUST PRECLUDE THEM FROM ATTACKING IT AT THIS TIME.

(Pl. Br. 118-32; Pl. R. Br. 43-6; Ind. Gas Br. 56-60, 77-8;
City Br. 53-66; Supp. Mem. 19-21; *supra*, pp. 13-14.)

(a) Citizens Gas Is Estopped From Denying That the Lease is Valid For Its Full Term, and the Trust Property is Subject to the Obligations Arising Out of this Estoppel.

(Pl. Br. 120-124; City Br. 54-6.)

Before the Public Service Commission, in the *Fishback* case, and in the *Williams* case, Citizens Gas insisted that the Lease was valid for its full term and in each instance this contention was sustained. Also, it represented to the investing public that it had a 99-year lease on the property of Indianapolis Gas, under the terms of which it guaranteed the interest on the Indianapolis Gas Bonds. The general public was thereby induced to buy the \$2,000,000 of Indianapolis Gas Bonds sold by Citizens Gas and to continue to hold the outstanding Bonds.

The trust property is subject to all the obligations of Citizens Gas, including those arising out of this estoppel.

(b) The City is Estopped From Denying That the Lease is Valid For Its Full Term.

(Pl. Br. 124-9; Pl. R. Br. 43-6; Ind. Gas Br. 77-8, City Br. 53-66; Supp. Mem. 19-21; *supra*, pp. 13-14.)

For 22 years the City represented, and stood by while Citizens Gas represented, that the Lease was valid and binding for its full term. When beneficiaries of the trust attacked the Lease, the City affirmatively insisted that the Lease was valid. As late as June, 1935 it sold its Revenue Bonds on the representation that it was taking over the entire system operated by Citizens Gas, including the property leased from Indianapolis Gas.

(c) The City is Precluded By Its Own Laches and the Laches of Citizens Gas From Denying That the Lease is Valid and Binding For Its Full Term.

(Pl. Br. 129-132; Ind. Gas Br. 56-60; City Br. 63.)

The trust had the benefit of the Lease for a period of 22 years before the City asserted that the Lease was no longer binding. The City was a party to several proceedings in which it should have spoken if it ever intended to repudiate the Lease. In each instance the City took the position that the Lease was a binding obligation of the trust.

V. THE INTEREST RATE ON THE COUPONS AFTER MATURITY AND ON THE JUDGMENT SHOULD BE SIX PER CENT.

(Pl. Br. 134-8; Pl. R. Br. 55-6; Ind. Gas Br. 82-3.)

Under the Indiana statutes plaintiff is entitled to 6% interest on (1) the overdue coupons, from the dates of their maturities, and (2) the judgment itself. The fact that the *Bonds* bear interest at 5% is immaterial with respect to the rate on the overdue *coupons* and on plaintiff's judgment.

VI. THE CIRCUIT COURT OF APPEALS PROPERLY REFUSED TO REALIGN INDIANAPOLIS GAS WITH CHASE AS A PARTY PLAINTIFF.

(Pl. Br. 38-45; Pl. R. Br. 9-14; Ind. Gas Br. 27-9;
City Br. 22-32; Supp. Mem. 23; *supra*, p. 16.)

Plaintiff has several controversies with Indianapolis Gas, in one of which it obtained a judgment which would now amount to more than \$2,106,000. Plaintiff was entitled to make Indianapolis Gas a defendant in order to obtain an adjudication against it on these matters.

A defendant with whom the plaintiff has one or more controversies is not realigned with the plaintiff for jurisdictional purposes, even when plaintiff and such defendant are in accord as to some other phase of the same suit.

VII. THE CITY HAD AMPLE OPPORTUNITY TO BE HEARD ON THE QUESTION WHETHER THE ALLEGED BURDENSONENESS OF THE LEASE WOULD BE A GOOD DEFENSE IF PROVED AND THE COURT OF APPEALS' DIRECTION TO ENTER FINAL JUDGMENT WITHOUT A RETRIAL OF THAT IMMATERIAL ISSUE WAS IN FULL ACCORD WITH DUE PROCESS OF LAW.

(Pl. Br. 45-56; Pl. R. Br. 14-31, 58-69; Ind. Gas Br. 29-61; City Br. 32-43; Supp. Mem. 13-16; *supra*, pp. 9-13.)

The complete immateriality of this question is shown by the City's admission that it took over *all* the trust property (*supra*, pp. 2-4), whether burdensome or not.

(a) The City Had Ample Opportunity to be Heard in Both Lower Courts on the Question Whether Burdensoneness Would be a Valid Defense—Moreover the Hearing in the District Court Was Not Essential to Due Process of Law.

(Pl. Br. 47-9; Pl. R. Br. 17-25, 58-69; City Br. 36-43.)

(b) To the Extent, If At All, That the Circuit Court of Appeals Based Its Decision on the Williams Case, It Was Fully Justified In Doing So, For the Parties Were Fully Heard in the District Court As to the Effect of That Adjudication.

(Pl. Br. 52-3; Pl. R. Br. 26-30; City Br. 39-42; Supp. Mem. 15-16; *supra*, p. 15.)

There is no indication that the court below held that the question of burdensomeness is *res judicata*. In any event, the facts as to the *Williams* case were fully presented to the District Court and there is no factual basis for the City's contention that it was denied a hearing in the trial court as to the effect of that case.

(c) The Decision of the Circuit Court of Appeals That the Alleged Burdensomeness Would not be a Valid Defense If Proved Is Obviously Correct.

(Pl. Br. 50-54; Ind. Gas Br. 29-61; *supra*, p. 9.)

Since the City has taken over *all* the trust property, the issue of burdensomeness is moot and wholly immaterial. The *Williams* case conclusively determined that the Lease would be binding on the trust even if it were proved to be burdensome. Further, as the City admits, the Public Service Commission has conclusively determined that the Lease "was advisable *and in the public interest.*" (City Br. 71.)

Under the law of Indiana, neither a municipality nor other party to or assignee of a contract or lease can escape its obligations thereunder by showing that they were originally or have become burdensome.

(d) The Circuit Court of Appeals Having Correctly Determined That Burdensomeness Would Not Be a Valid Defense If Proved, Its Direction to Enter Final Judgment Was In Full Accord With Due Process of Law.

(Pl. Br. 55-6; City Br. 36-7.)

The right to prove allegations which would be unavailing even if proved is not an element of due process of law.

VIII. THE RULE OF ERIE RAILROAD COMPANY v. TOMPKINS REQUIRED THE DECISION THAT THE LEASE IS VALID AND BINDING AND IN MAKING THAT DECISION THE CIRCUIT COURT OF APPEALS FULLY COMPLIED WITH THAT RULE.

(Pl. Br. 69-70, 75, 89, 132-4; Pl. R. Br. 42-55; Ind. Gas Br. 77-9; City Br. 52-86; Supp. Mem. 19-22; *supra*, p. 15.)

Every Indiana decision bearing upon the question compels the conclusion that the Lease is valid for its full term. The City's *present* contentions were all conclusively negatived, as a matter of Indiana law, in the *Williams* case.

(a) **The Circuit Court of Appeals Did Not Hold That the City is Estopped to Deny the Validity of the Lease, but Under the Law of Indiana It Would Have Been Fully Warranted In Doing So.**

(Pl. Br. 120-9; Pl. R. Br. 43-6; City Br. 53-66;
Supp. Mem. 19-21; *supra*, p. 13.)

(b) **The Order of the Public Service Commission is a Conclusive Determination That the Lease is In the Interest of the Public Charitable Trust and In Fulfillment of the Duties of Citizens Gas as a Public Utility and the Circuit Court of Appeals Did Not Deviate From the Law of Indiana in Determining the Significance of That Order.**

(Pl. Br. 90-2; Pl. R. Br. 46-9; Ind. Gas Br. 39-45;
City Br. 67-71.)

Under the law of Indiana as announced in the *Williams* case the public charitable trust is subject to the power of the state to control as a public utility. (*supra*, I(e), p. 22.) The act of the Public Service Commission in approving the Lease was an exercise of this power and was a conclusive determination that the Lease is in the public interest (III (b), *supra*, p. 26).

(c) **The Circuit Court of Appeals Did Not Hold That the Validity of the Lease is *res judicata*, But Under the Law of Indiana It Would Have Been Fully Warranted In Doing So.**

(Pl. Br. 74-90; Pl. R. Br. 49-55; Ind. Gas Br. 45-54;
City Br. 72-86; *supra*, p. 15.)

The Circuit Court of Appeals did not hold that the Indiana decisions to which it referred were *res judicata*, but that those decisions sustaining the validity of the Lease are controlling under the rule of *Erie Railroad Company v. Tompkins*.

The Circuit Court of Appeals would have been fully warranted in holding that the question as to the validity and present binding effect of the Lease is *res judicata* (see point III(a), p. 25 above).

(d) The Circuit Court of Appeals' Construction of the Franchise and Charter of Citizens Gas is in Complete Accord With Indiana Law.

(Pl. Br. 56-74, 133-4; Pl. R. Br. 32-40; City Br. 49-52;
Supp. Mem. 16-19; *supra*, p. 8.)

Under the law of Indiana when, as in this case, a franchise contains a contract with the municipality as well as a grant to occupy the streets, such *contract* is construed like any other contract.

The Circuit Court of Appeals' construction of the Franchise and Charter of Citizens Gas was required by the construction of the same Franchise and Charter by the Indiana Supreme Court in the *Williams* case and by the Indiana law applicable to the facts here presented (Point I, *supra*, p. 21).

(e) The Statutory Prohibitions on Which the City Relies have No Application to This Case.

(Pl. Br. 93-8, 134; Pl. R. Br. 40-1; Ind. Gas Br. 70-74; City Br. 45-8; City Ans. Br. 1-4; Supp. Mem. 6-9; *supra*, pp. 6-7.)

This matter is discussed under point II(a), page 23 above.

